

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Investigation by the Department of Telecommunications and Energy on)
its own motion pursuant to G.L. c. 159, §§ 12 and 16, into Verizon) D.T.E. 01-34
New England Inc., d/b/a Verizon Massachusetts' provision of)
Special Access Services.)

AT&T COMMUNICATIONS OF NEW ENGLAND, INC.'S
MOTION TO EXPAND INVESTIGATION

AT&T Communications of New England, Inc., on behalf of itself and its affiliated entities that provide telecommunications services in Massachusetts ("AT&T"), hereby petitions the Department of Telecommunications and Energy ("Department") to expand its investigation of Verizon New England Inc., d/b/a Verizon Massachusetts' ("Verizon") performance with respect to special access service offerings in Massachusetts provisioned by Verizon under M.D.T.E. No. 15, to include special services ordered under state and federal tariff.

Argument

THE DEPARTMENT SHOULD INVESTIGATE VERIZON'S PERFORMANCE WITH RESPECT TO ALL SPECIAL ACCESS OFFERINGS IN MASSACHUSETTS, INCLUDING THOSE PROVISIONED UNDER THE FEDERAL ACCESS TARIFF.

A. The Department Must Exercise Its Authority Over All Of Verizon's Intrastate Special Access And Special Services Offerings In Order To Address The Extensive Problems Encountered By Massachusetts Telecommunication Carriers and Consumers.

The wholesale market for special access in Massachusetts is highly monopolized. While competitive carriers have begun to enter the retail market for special services consumers in Verizon's service territory, the special access component that carriers must rely on typically can be obtained from only one provider, namely, Verizon itself. For this reason, Verizon's performance with respect to ordering, provisioning and maintaining special access for its wholesale customers is not affected by market forces.

At the same time that Verizon constitutes the dominant provider of special access to carriers, Verizon also competes directly with those carriers for retail customers. This dual role creates an inherent risk that Verizon may obtain a competitive advantage in the retail market for special service customers by providing its wholesale special access customers service quality which is inferior to the service quality that Verizon's retail customers experience. Yet Verizon is obligated to provide facilities to its wholesale customers in a reasonable and non-discriminatory manner. Because the consequences of Verizon's failure to do so are inherently local,

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and are harming competitive carriers and frustrating telecommunications consumers in Massachusetts, state power must be exerted to ensure that these facilities are provided in a timely and non-discriminatory manner.

As the Department stated in its March 14, 2001 Vote and Order to Open Investigation ("March 14 Order") in this docket, it has received numerous complaints from carriers concerning Verizon's special access services. *Id.* at 1. In particular, carriers ordering special access from Verizon encounter extremely long intervals for provisioning, failure to meet these extended intervals, and failure to keep carriers informed of the status of their orders. *Id.* Indeed, the Department noted that "one end-user customer . . . attributed Verizon's lack of reliability as one cause for it to move some of its business out of state." *Id.* at 2. Clearly, Verizon's poor performance has consequences that are felt dramatically in Massachusetts. The Department, therefore, appropriately opened this docket to investigate problems with respect to special access provisioning. If, however, the investigation is confined only to services that Verizon provisions under Tariff 15, the Department will so limit its access to meaningful data that it will significantly undercut its ability to assess the nature and extent of the problem and design an appropriate solution.

B. Because Verizon Provisions A Significant Portion, Perhaps Most, Of Special Access Circuits Under The Federal Tariff, There May Be Little Activity For The Department To Investigate Unless The Department Expands The Scope Of This Proceeding.

In its March 14 Order opening this docket, the Department stated that the investigation would focus on Verizon's provision of special access services pursuant to M.D.T.E. No. 15. *Id.*, at 1. The Department should expand the scope of its investigation because most of the problems that the Department cites as the reason for this docket may not even have arisen in connection with the ordering of special access under the Massachusetts tariff. A significant portion, perhaps most, of the special access circuits that Verizon provisions are provisioned under the federal access tariff. This is because Verizon provisions special access circuits under the federal tariff unless the percentage of intrastate traffic on the circuit is expected to exceed 90%. Yet, the tariff under which the service is provisioned is largely invisible to the customer ordering the service. There is no difference in the ordering processes, equipment or connections between special access services ordered pursuant to federal tariff and special access services ordered pursuant to state tariff. Thus, the complaints that the Department has heard regarding Verizon's special access provisioning certainly included (and was perhaps exclusively related to) provisioning under the federal tariff.

The Department opened this investigation because it correctly perceived that there is potentially a real problem related to Verizon's provisioning of special access circuits and that the problem has significant consequences to the well being of the Massachusetts economy. However, limiting the investigation to the fraction of orders not steered by Verizon to fall under the federal tariff will mean that the Department's investigation will neither address nor resolve in a meaningful way the critical problems faced by competitive carriers and their customers in Massachusetts. (1) In short, the consequences of Verizon's conduct and performance are local. As a result, Massachusetts end-users look to the Department to investigate and regulate the aspects of Verizon's special services provisioning that affect their ability to do business in Massachusetts.

C. The Department Has Jurisdiction To Investigate And Regulate The Quality Of Verizon's Performance In Provisioning Special Access Circuits Ordered Under The Federal Tariff.

The Department has jurisdiction to investigate all of the special access provisioning problem. First, the Department has general authority to regulate intrastate telecommunications services pursuant to G.L. c. 159, § 12(d). Special access circuits ordered under the federal tariff carry up to 90% intrastate traffic. Under state law, therefore, the Department has authority to regulate intrastate traffic even where such traffic is carried on circuits provisioned under the federal tariff. The only question is whether federal law preempts G.L. c. 159, § 12(d) with

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respect to such traffic. As the Minnesota Public Commission ("Minnesota PUC" or "PUC") has determined, it does not.

In In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against U.S. West Communications, Inc. Regarding Access Service, 2000 Minn. PUC LEXIS 53 (Docket No. p-421/C-99-1183; August 15, 2000), the Minnesota PUC faced precisely the same jurisdictional issue that is presented here - poor quality provisioning of special access circuits by the local exchange carrier. The PUC stated the question (and answer) as follows:

[M]ost of the access facilities involved are "mixed use" facilities, providing both interstate and intrastate services. They are classified as interstate facilities, however, because under FCC cost allocation rules, facilities that carry more than 10%-interstate traffic must be classified as interstate, with their services federally tariffed. The issue here is whether that cost allocation rule, which clearly preempts state authority to require state tariffs, also preempts state authority over the quality of these intrastate services. The Commission finds that it does not.

Id. at 10-11 (emphasis supplied; footnotes omitted). The PUC's reasoning was based on a careful preemption analysis, which focused on the factors set forth by the U.S. Supreme Court:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . when there is outright or actual conflict between federal and state law, . . . where compliance with both federal and state law is in effect physically impossible, . . . where there is implicit in federal law a barrier to state regulation, . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the State to supplement federal law, or . . . or where the state law stands as an obstacle to accomplishment and execution of the full objectives of Congress.

Id. at 11-12, quoting Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 368-69(1986) (citations omitted). While AT&T will not repeat all of the Minnesota PUC's analysis here, a few of the more important points warrant explicit mention.

First, the Minnesota PUC found that there is no clear expression of Congressional intent to preempt state law. Indeed, the Minnesota PUC found that Congress explicitly contemplated concurrent jurisdiction. Noting that "Congress has long been at pains to make it clear that the FCC shares jurisdiction over the nation's telecommunications network with the states," the Minnesota PUC went on to state:

Dual jurisdiction has long been the rule in the telecommunications arena. Further the Telecommunications Act of 1996 expressly preserves state authority to regulate access services for purposes of furthering competition. That is exactly the issue here, where AT&T claims competition is being undermined by the poor quality of U.S. West's wholesale access services and by discrimination in their provision.

Id. at 13, citing 47 U.S.C. § 261(c). (2)

On the second factor, the Minnesota PUC noted that that "[t]here is . . . no federal law with which any intrastate service quality directive of this Commission could conflict." Id., at 15. (This alone is a good reason for the Department to assert its jurisdiction in this area.) On the third, related factor, the Minnesota PUC found that, "[s]ince there are no federal wholesale access service quality standards, no service quality remedy imposed by this Commission could put U.S. West in the position of being physically unable to comply with both state and federal law." Id., at 15.

Finally, focusing on the issues of whether Congress has occupied the field and whether action by a state public service commission related to special access service quality could be an obstacle to federal objectives, the Minnesota PUC

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concluded:

Neither Congress nor the FCC has undertaken the kind of comprehensive regulation of telecommunications service quality that would suggest or demonstrate an intent to "occupy the field" of intrastate access service quality. In fact, quite the opposite - the statute is at pains to emphasize the continuing role of the states in ensuring service quality.

Similarly, it is implausible to suppose that any action taken by this Commission to remedy defects in U.S. West's intrastate access service quality would in any way stand as an obstacle to the accomplishment and execution of the full objectives of Congress or the FCC.

Id. at 15-16.

The Minnesota PUC's thorough preemption analysis demonstrates compellingly that state public service commissions are not preempted by federal law from regulating the quality of provisioning for intrastate access traffic where state law authorizes them to do so, even if the intrastate access traffic happens to travel over a circuit ordered under a federal tariff.

Conclusion

The Department has a strong public policy interest in investigating Verizon's performance in provisioning both intrastate and interstate access. First, many of the customers who are experiencing significant delays in Verizon's provisioning of both intrastate and interstate special access are Massachusetts corporations. This results in a direct and negative impact on the Massachusetts economy. Second, Verizon's actions are also affecting local competition: the customers that AT&T wants to serve and the facilities that it wants to put in place to serve them are being jeopardized by Verizon's discriminatory service. In short, the Department must act comprehensively on both intrastate and interstate access to ensure that Verizon does not jeopardize either the local economy or the growth of local competition.

AT&T therefore requests that the Department expand the scope of this proceeding to monitor Verizon's performance with respect to all special access - without regard to jurisdiction - and to establish performance standards and incentives to ensure that Verizon ceases undue or unreasonable preference or discrimination in the provision of special access services whether provided pursuant to state or federal tariff.

Respectfully submitted,

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1. 1 Verizon has already declined to respond to the first Department information request on the ground that it sought information regarding a special access circuit that was not ordered under the state tariff. See, April 2, 2001, Verizon response to D.T.E. 1-1.

2. 2 47 U.S.C. § 261(c) states:

Additional State Requirements. Nothing in this part precludes a state from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part of the Commission's regulations to implement this part.